UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corporation, et al.	)	Docket Nos. EL16-49-000
	)	
v.	)	
	)	
PJM Interconnection, L.L.C.	)	ER18-1314-000
	)	
PJM Interconnection, L.L.C.	)	ER18-1314-001
	)	
PJM Interconnection, L.L.C.	)	EL18-178-000 (Consolidated)

COMMENTS OF PUBLIC INTEREST ORGANIZATIONS ON PJM'S COMPLIANCE FILING REGARDING MINIMUM OFFER PRICE RULE

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or the "Commission"),[1] the Natural Resources Defense Council ("NRDC"), the Sierra Club, and the Sustainable FERC Project (collectively, "Public Interest Organizations" or "PIOs") offer the following response to PJM Interconnection, L.L.C's ("PJM's") March 18, 2020 *Compliance Filing Concerning the Minimum Offer Price Rule, Request for Waiver of RPM Auction Deadlines, and Request for an Extended Comment Period of at Least 35 Days* ("Compliance Filing") submitted in the above-captioned proceedings. That filing proposes specific steps to implement the Commission's December 19, 2019 *Order Establishing Just and Reasonable Rate*,[2] which imposes a minimum offer price rule ("MOPR") on all new and many existing resources that the Commission determines receive a "state subsidy."

[1] 18 C.F.R. §§ 385.213 (2019).
[2] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (Dec. 19, 2019) ("December 2019 Order").

PIOs note their continued objection to the Commission's December 2019 Order, and its April 16, 2020 *Order on Rehearing and Clarification* in Consolidated Docket Nos. EL 16-49-002 and EL 18-178-002[3] confirming and even extending the application of the MOPR to yet more capacity resources in PJM. As reflected in our filings in this matter, the PIOs continue to believe the expanded MOPR has unleashed enormous uncertainty for PJM market participants, threatens to impose staggering costs on consumers, and improperly nullifies state policies concerning generation. Whether the Commission's Orders were within its jurisdiction, supported by the record, and reflecting reasoned decision-making is now a question for the federal courts to decide.[4]

Notwithstanding our underlying opposition to the expanded MOPR, the PIOs recognize that PJM's Compliance Filing is largely consistent with the December 2019 Order and, if approved, will result in a process that minimizes the short-term impacts of the expanded MOPR. As such, we recommend that the Commission accept PJM's Compliance Filing with a few important exceptions described below.

I. COMMENTS

A. The Compliance Filing proposes a rational approach to calculating default offer floors and allows appropriate flexibility for determining resource-specific offer floors.

The MOPR functions primarily by setting offer floors for affected capacity resources, making proper determination of those offer floors critical for achieving the desired outcome. Offer floors set too low defeat the MOPR's purpose of preventing price suppression, while offer

[3] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035 (Apr. 16, 2020) ("Order on Rehearing" or "April 2020 Order")

[4] The PIOs maintain their position that the Commission's decision to apply an expanded MOPR in PJM is erroneous and have sought judicial review of the December 2019 and April 2020 Orders; our recommendations herein are not to be construed as a change in position and we preserve all arguments made in our January 21, 2020 Request for Rehearing. *See, e.g.*, Petition for Review, *Environmental Defense Fund et al. v. FERC*, (No. 20-1131). To date, there are no less than 13 petitions for review of the Commission's December 2019 Order have been filed.

floors set too high create discriminatory barriers against economic resources, stifle innovation, and ultimately result in unjustly high rates.

1. The proposed methods for calculating default offer floors are transparent and, in general, reasonable.

The Compliance Filing presents a method for calculating a default Net CONE[5] for most capacity resources based on publicly available sources, historical price data, and explicit operating and revenue assumptions.[6] PJM's choice to base Gross CONE on Energy Information Agency ("EIA") data for most resource classes appropriately relies on objective and well-documented sources. As PJM notes,[7] this approach is replicable by any member of the public, an important consideration in preventing undue discrimination.

Calculating Net CONE requires assumptions about resources' revenue, and maintaining accurate Net CONE values requires annual adjustments. The compliance filing proposes simulating asset operations to determine energy revenues,[8] assumes $3,350/MW-year in ancillary service revenues for most technologies,[9] and adjusts values annually based on Bureau of Labor Statistics inflation indices.[10] These methods may be appropriate for mature technologies such as gas turbines and nuclear power, but PIOs believe they fall short in two specific areas.

[5] It remains the PIOs' position that FERC's application of an expanded MOPR in PJM, including its decision to require the use of Net CONE as the basis for calculating the default offer floor for new resources, results in unjust and unreasonable rates; our comments herein pertain solely to the efforts made by PJM to implement FERC's decision. *See* Request for Rehearing of Clean Energy Advocates at 65, Docket Nos. EL16-49 *et al.* (Jan. 21, 2020).
[6] Compliance Filing at 52–66. *See also* Compliance Filing at Attach. E, Affidavit of Adam J. Keech On Behalf of PJM Interconnection L.L.C. ("Keech Aff.") at PP 5–25.
[7] Keech Aff. at P 20.
[8] Compliance Filing at 61.
[9] *Id.* at 62.
[10] *Id.* at 55.

(i) The proposed inflation adjustment may fail to capture rapid declines in costs of advancing technologies.

Storage, solar, and wind have all seen dramatic cost decreases in recent decades.[11] Solar and storage, in particular, are areas of very active research, and the fundamental limits of the technologies behind these resources remain to be established. Although the cost of wind power is more dependent on mature industries like concrete and steel, it is not unreasonable to expect wind cost to continue to decline as manufacturing increases.

PIOs are thus concerned that PJM's proposed use of inflation indices will systematically overestimate the costs of solar, storage, and wind. Such systematic error is unduly discriminatory, especially as it falls most heavily on technologies enjoying the most rapid innovation. This discrimination can be avoided by requiring PJM to recalculate Gross CONE for these three technologies annually, rather than once every four years, or by incorporating more specific cost indices than the proposed "Producer Price Index for Goods Less Food and Energy, Private Capital Equipment" index.[12]

(ii) The Compliance Filing underestimates the ancillary services revenue of storage.

To date, the business case for most non-hydro storage ("advanced storage") in PJM has been based on providing ancillary services.[13] Advanced storage provides a disproportionate share

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[11] *See, e.g.*, David Feldman *et al.*, *NREL Q3/Q4 2019 Solar Industry Update*, NREL, at 34 (Feb. 18, 2020), https://www.nrel.gov/docs/fy20osti/76158.pdf. *See also,* Matthew Bandyk, *Battery prices fall nearly 50% in 3 years, spurring more electrification; BNEF*, Utility Dive (Dec. 3, 2019), https://www.utilitydive.com/news/battery-prices-fall-nearly-50-in-3-years-spurring-more-electrification-b/568363/. *See also* Ryan Wiser *et al.*, *2018 Wind Technologies Market Report*, U.S. Department of Energy (Aug. 2019) https://www.energy.gov/sites/prod/files/2019/08/f65/2018%20Wind%20Technologies%20Market%20Report%20FINAL.pdf.

[12] Compliance Filing at 55.

[13] *See* Eric Hsia, *Energy Storage in PJM: A Perspective*, PJM Inside Lines (Sept. 16, 2019), https://insidelines.pjm.com/energy-storage-in-pjm-a-perspective/.

of ancillary services.[14] Our understanding is that ancillary services are the primary revenue source for most advanced storage in the PJM footprint. This makes the proposed $3,350/MW-year of ancillary services revenue inaccurate, resulting in Net CONE values that discriminate against storage in the capacity market. The excessive offer price floors resulting from this methodology also result in over-mitigation and, therefore, capacity rates that are not just and reasonable.

PJM has seen significant amounts of advanced storage built with little to no expectation of capacity revenue. This strongly suggests the Net CONE for advanced storage is close to zero, as developers appear to consider storage economic even absent capacity revenue.

As ancillary services are a significant revenue source for storage, estimates for ancillary service revenue should reflect methods developed for estimating other technologies' energy revenues: either simulated dispatch or historical averages. The use of a very low ancillary services revenue estimate for storage, and the ensuing conclusion that storage has a high Net CONE are both contradicted by observed facts. This is an unreasonable and easily correctible error that results in undue discrimination against storage in the capacity market, and unjust and unreasonable rates.

2. PJM's proposal to allow resources flexibility in the calculation of resource-specific offer price floors is consistent with the Commission's order and essential to allow for more accurate offers.

In the December 2019 MOPR Order, the Commission refers to the unit-specific exemption process as the "safety valve" preventing the MOPR from unjustly preventing particular resources from competing for capacity revenues:

> We find that PJM's Unit-Specific Exemption . . . is an important tool for establishing just and reasonable rates . . . The replacement rate adopted here is

[14] Monitoring Analytics, LLC, *2020 Quarterly State of the Market Report for PJM: January through March*, at Table 10-36, https://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2020.shtml.

> intended to promote the market's selection of the most economic resources available to serve load reliably, not to reject resources simply because they are subsidized to some degree. The review process operates as a safety valve that helps to avoid over-mitigation of resources that demonstrate their offers are economic based on a rational estimate of their expected costs and revenues without reliance on out-of-market financial support through State Subsidies.[15]

This is consistent with the Commission's prior determinations that a properly designed MOPR requires a unit-specific review process to avoid undue discrimination and ensure just and reasonable rates.[16] For this mechanism to function, the resource-specific offer floor process must allow resources to obtain a price floor that reflects their economics as accurately as possible.

Consistent with the Commission's intention of allowing the resource-specific price floor process to serve as a realistic path for "competitive" resources to clear the auction, PJM's compliance filing proposes to offer an appropriate degree of flexibility to resources seeking a lower price floor that the default. Most significantly, PJM proposes to allow new resources to have an offer floor calculated based on an asset life longer than 20 years, but less than 35 years, if the developer can provide:

> evidence to support the use of a different asset life, including but not limited to, the asset life term for such resource as utilized in the Capacity Market Seller's financial accounting (e.g., independently audited financial statements), or project financing documents for the resource or evidence of actual costs or financing assumptions of recent comparable projects to the extent the seller has not executed project financing for the resource (e.g., independent project engineer opinion or manufacturer's performance guarantee), or opinions of

[15] December 2019 Order at P 16.

[16] *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61252 at P 43 (Dec. 8, 2017) ("reaffirm[ing] the Commission's prior findings with regard to the need for a unit-specific review process[, because] a properly designed MOPR should not erect an unnecessary barrier to entry that is detrimental to a competitive market").

> third-party experts regarding the reasonableness of the financing assumptions used for the project itself or in comparable projects.[17]

PJM's proposal would allow for resources to obtain offer price floors that accurately reflect the time period over which the resource owner, and, importantly, their financiers, expect to earn revenues. A resource designed and built to operate for longer than 20 years is more competitive than one that can operate for only 20 years, all else being equal, because the more enduring resource has more years over which to recover capital costs. In a 2011 order approving the use of a unit-specific offer floor process, the Commission rejected arguments that cost advantages not available to the benchmark unit should be reflected in a resource's offer price, noting that its order "requir[ing] sell offers to be 'consistent with' the competitive, cost-based cost of new entry . . . did not require that such offers be "equal to" that standard or dictate that no cost advantages or revenues outside of the PJM markets can be included in a sell offer."[18] A longer asset life or better financing terms is exactly the type of competitive advantage that should be reflected in a resource's offer.

Furthermore, the evidentiary protections that PJM proposes, and the dual role of the Independent Marketing Monitor ("IMM") and the Office of Interconnection in reviewing the proffered evidence of asset life, are sufficient to ensure that an offer floor is calculated using a longer asset life only where justified. The required evidentiary submissions appropriately bound the inherent subjectivity associated with the resource-specific offer floor process,[19] and provide a reasonable objective basis for analysis of claims by new entrants that an asset life longer than 20

[17] Compliance Filing at Proposed Tariff, Attachment DD, section 5.14(h)(3)(B).
[18] *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 244 (Nov. 17, 2011).
[19] *Id.* at P 245 ("while such discretion should be minimized to the extent possible, some amount of discretion is unavoidable and perhaps even necessary when making the types of determinations proposed by PJM in its compliance filing.").

years is warranted.[20] Inflexible parameters for offer floors (i.e., not allowing resources to establish different financing or project life characteristics), would result in overmitigation and rates that are not just and reasonable, because it would "narrow[] the opportunity for resources with potentially competitive costs to avoid the default offer floor."[21]

Because PJM's proposal to allow carefully circumscribed flexibility regarding asset life in the calculation of default offer floors for new resources subject to the MOPR is consistent with prior FERC precedent emphasizing the importance of unit-specific review, and the December 2019 order's reassurances that the unit-specific process would provide a safety value against overmitigation, FERC should approve PJM's proposí tariff language regarding resource-specific offer price floors.

B. The Commission should reject limited portions of PJM's Compliance Filing that will not lead to a rational or workable implementation of the MOPR.

1. Auction Timing

In the December 2019 order, the Commission required PJM to "provide revised dates and timelines for the 2019 Base Residual Auction ("BRA") and related incremental auctions, along with revised dates and timelines for the May 2020 BRA and related incremental auctions, as necessary."[22] PIOs support many elements of PJM's proposed schedule for the 2022/23 BRA and subsequent auctions, but oppose others.

PJM proposes to hold the next BRA (for delivery year 2022/23) six and a half months following an order on the compliance filing. This represents a compression of PJM's established pre-auction schedule by over two months.[23]

[20] December 2019 Order at n.36.
[21] PJM Interconnection, L.L.C., 161 FERC ¶ 61,252 at P 45 (Dec. 8, 2017).
[22] December 2019 Order at P 4.
[23] Compliance Filing at 84.

At a time when PJM anticipated an order from the Commission on its compliance filing by mid-May, PJM's proposed schedule would have resulted in a December auction. However, PJM acknowledged that the Organization of PJM States ("OPSI"), had requested that the auction be held no sooner than 12 months after the date of a compliance order, but in no case later than May 2021. In its letter to the PJM Board of Managers,[24] OPSI explained:

> FERC's Order directly challenges existing state policies and alters the way resources affected by state policies may participate in PJM's capacity auctions. As a result, in order to ensure resource adequacy and service reliability within the PJM region, states may need to develop, adopt, and implement new legislation and/or administrative rules to reform their approach to resource planning, capacity procurement, state resource compensation or other related processes.

With the Commission's recent determination that capacity resources indirectly benefiting from state default service auction process are also subject to the MOPR,[25] the impact of the MOPR on state policies has become only more disruptive, further supporting OPSI's request for an adequate period of time for states and market participants to adapt before the next auction. Some states may require new legislation to appropriately adapt to the MOPR, which can only occur following fixed legislative calendars.

PJM states that it considered OPSI's request and has weighed it against the interests of moving ahead with the next auction.[26] But PJM's proposed compromise in no way meets the concerns expressed by the states and has become inadequate in light of recent events. PJM proposed to allow the 2022/23 auction to be postponed to March 2021 "in the event that

[24] Talina R. Mathews, *Re: Scheduling the next Base Residual Auction*, OPSI (Feb. 13, 2020), https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/20200219-opsi-letter-re-scheduling-next-base-case-residual-auction.ashx?la=en.
[25] April 2020 Order at P 386.
[26] Compliance Filing at 85–86.

legislation directly applicable to new elections of the FRR alternative is enacted before June 1, 2020, and upon request of a state public utility commission acting in its official capacity."[27]

First, the opportunity to request a delay requires states to take a very specific form of legislative action related to new elections of the FRR Alternative. But the FRR Alternative is not the only step that states might need to take to protect consumers and state policies from the harm of the MOPR—states may also need to revisit the structure of their default service auctions, the manner in which state objectives relating to generation are pursued,[28] or budgets for bill payment assistance. Nor does the FRR Alternative always require new legislative authority to implement, even if administrative implementation would also require significant time. PJM's proposal also requires that legislative action be taken by June 1, 2020. This would require states to act before the Commission has even issued an order on PJM's Compliance Filing.[29] States cannot fully understand the implications of the MOPR and design appropriate remedies until the Commission has approved a final set of capacity market rules. Finally, societal circumstances which PJM could not have fully foreseen at the time of its Compliance Filing have rendered the June 1 legislative deadline impossible for many legislatures to meet. As a result of the COVID-19 pandemic, legislative sessions have either been suspended or refocused on more urgent public health and emergency economic relief measures. For all of these reasons, PJM's proposal to accommodate OPSI's request for adequate time before the next auction is inadequate. Instead, the next Base Residual Auction should be held in May 2021. Given that PJM must submit, in early June, a second compliance filing to address new matters from the April 2020 rehearing

[27] *Id*. at 86.
[28] For example, since the Commission has now clarified that RGGI and similar programs that impose costs on certain generators do not trigger the MOPR, whereas state programs that bestow indirect benefits do, states may want to reconsider the design of their statutes.
[29] Even under the optimistic circumstances of PJM's submission of the Compliance Filing, in which the Commission would have issued an order by mid-May, the June 1 deadline would give states a mere two weeks to review the order and determine whether significant legislative action was needed.

order, it seems increasingly unlikely that there will be a final, approved set of rules for RPM until late summer, making an auction in late spring of 2021 the most realistic and fair to all participants.

It is especially important that the next BRA not be held until an updated load forecast can be prepared. PJM typically publishes its updated load forecast in early January, meaning that an auction held this December would rely upon a load forecast produced in 2019. Unfortunately, the economic fundamentals underlying the load forecast have changed significantly in the intervening months, as PJM staff has acknowledged in recent meetings.[30] PJM's load forecasts have consistently trended as much as 10,000 MW high, but become more accurate as the delivery year approaches. These circumstances already distort the efficiency of RPM, and would only be exacerbated by relying upon a load forecast that has become even more inaccurate under the circumstances. PJM staff are already working on updates to the load forecast to account for changes in the economic inputs, and the next auction should not be scheduled to occur before PJM staff are able to complete those updates, consider stakeholder feedback, and publish the newest load forecast.

PJM proposes to conduct the next three auctions (for DYs 23/24 through 25/26) only six months apart. PJM's proposal does not state whether it plans to update the load forecast prior to each of these BRAs, either in full or in part. Given the rapidly changing economic circumstances that affect a key input to the BRA, and PJM's history of producing more accurate forecasts closer to the delivery year, the Commission should require that the schedule for these next three BRAs allows time for updated load forecasts to be developed. Doing so may require PJM to add additional time in between the auctions.

[30] *See, e.g.*, PJM, *April Forecast Update*, Load Analysis Subcommittee (May 5, 2020), https://www.pjm.com/-/media/committees-groups/subcommittees/las/2020/20200505/20200505-item-04-april-forecast-update.ashx.

PJM's proposed interval between auctions is likely to severely hamper states' ability to react to the results of one BRA before critical deadlines pass for the next one. For example, PJM's proposed schedule will allow only about 8 weeks between the time that the BRA results are published and the deadline to elect the FRR. If a BRA results in significant price increases and the exclusion of large quantities of state-supported resources, the state legislature and utility regulators would have very little time to enact statutes or promulgate new regulations to facilitate utilities in the state utilizing the FRR. A schedule that effectively denies states the ability to protect consumers from sharp price increases will only increase tension between the states and the Commission around this issue. Therefore, the Commission should require that at least 8 months elapse in-between subsequent BRAs until the normal schedule is able to resume.[31]

Taken together, the steps we propose—delaying the next BRA to May 2021 and holding subsequent auctions at 8-month intervals—will provide market participants, PJM and the market monitor with the time needed to adjust to running the auction under significantly modified rules. This additional time will also provide states with a reasonable amount of time to react to auction results, should the impacts on consumers or state policy be severe.

2. PJM's Proposed MOPR Determination Processes Lacks Clarity, Transparency, and Accountability

FERC's decision to expand the MOPR across the entire spectrum of capacity resources can potentially upend the PJM market completely . Given the Commission's broad definition of state subsidy, every capacity resource is potentially affected by the MOPR. And because determinations of who is subject to the MOPR and at what level they will be permitted to offer

[31] This 8-month period in between subsequent BRAs will require rescheduling BRAs through the one held for DY 2027/28. Assuming the next BRA occurs in May 2021, we propose that the BRAs for the following six auctions would be rescheduled as follows: DY 2023/24 auction held January 2022, DY 2024/25 auction held September 2022, DY 2025/26 auction held May 2023, DY 2026/27 auction held January 2024, DY 2027/28 auction held September 2024.

into RPM will be administratively determined by PJM, fair implementation of the Commission's MOPR order requires clarity, transparency, and accountability. Yet PJM's MOPR implementation procedures fail to meet the kind of essential standards the Commission explicitly stated were necessary to protect the market from undue discrimination.

(i) The Commission's Order on Rehearing Invalidates Certain Aspects of the Compliance Filing and Creates Unaddressed Issues

The Compliance Filing proposes a process that begins with determining if a capacity resource is "entitled to receive" a state subsidy.[32] A string of administrative steps follow from this determination. However, the Order on Rehearing clarified that power sales constitute a state subsidy if the buyer is a Public Power Entity.[33] This leaves every capacity resource capable of entering into a contract "entitled to receive" a state subsidy. The result is that the portions of the procedures in the Compliance Filing concerned with differentiating between subsidized and unsubsidized capacity resources are moot. With the Commission's clarification that commercial transactions may constitute a subsidy depending on who the counterparty is, all capacity resources are entitled to receive state subsidies. Any resource that wishes to avoid a MOPR offer floor must certify to PJM that they are not selling power to public power entities or basic service procurements,[34] and commit to not doing so in the future.

The clarification that arms-length power sales may constitute a state subsidy raises deeper issues that PJM's tariff will be incomplete without addressing. The clarifications in the Order on Rehearing establish that there is no way of knowing if a contract constitutes a subsidy without following the power to its ultimate purchaser. Many power transactions occur through brokers or

[32] Compliance Filing at 5–6.
[33] Order on Rehearing at P 243.
[34] PIOs remain uncertain if power sales to government agencies for routine use are considered a State Subsidy. Such a sale, e.g., to a town's highway department for street lighting, is a "direct or indirect payment that is a result of any action of a subdivision or agency of a state that will support the operation of a capacity resource," and so appear to meet the Commission's definition.

other intermediaries, are aggregated, associated with multi-party hedging arrangements, etc., making it difficult for resource owners to determine the ultimate buyer.

An ability to track these purchases is necessary for a well-functioning MOPR; otherwise, the MOPR could be easily evaded by having purchases flow through third parties. There are currently no mechanisms in place for this type of customer-chain auditing, which will likely require intermediate parties to provide information on their customers that they are unwilling or unable to reveal. Resource owners are instead placed in the unenviable position of either having to renegotiate many of their PPAs or simply accept that they are unable to certify they are unsubsidized. Penalties for a resource owner that incorrectly certifies it does not receive a subsidy are severe. Resource owners that are unable to audit their customer chain fully will likely avoid the risk of incurring penalties by accepting an offer floor.

Absent clear reporting requirements, expanded discovery powers for PJM and/or the Market Monitor, and possibly some form of safe harbor for resource owners, uncertainty regarding the ultimate purchaser of power is likely to result in over mitigation of resources that do not receive a subsidy but are unable to verify they do not. The Commission should direct PJM to make a further compliance filing addressing this issue in light of the clarifications contained in the Order on Rehearing.

(ii) The Proposed Self-Certification Approach Creates Dangerous Uncertainty Regarding What Constitutes a State Subsidy

A significant challenge with implementing the Commission's MOPR Order is the preliminary step of determining what state or local government support qualifies as a non-exempt state subsidy and to whom it applies. As had been anticipated by those objecting to the breadth of the Commission's definition of state subsidy, PJM admits it:

> …cannot possibly know each direct and indirect benefit a resource is receiving (or is entitled to receive) from state or local governments. Nor can PJM be aware of each direct and indirect benefit the 13 states and innumerable local governments may make available to resources in the PJM Region. PJM cannot track these benefits and determine each resource that is entitled to them.[35]

PJM sidesteps this challenge by proposing to shift the burden of interpreting FERC's MOPR order onto capacity resources, who must self-identify whether they are receiving or are entitled to receive a state subsidy.[36] PJM proposes that this be accomplished via an electronic certification for each resource stating whether it is receiving a state subsidy and, if so, identifying the specific state or local program providing the subsidy.[37] Certifications must be received no later than 120 days prior to a relevant RPM Auction.[38] Capacity resources that fail to self-certify by the relevant deadline will generally be subject to the default MOPR floor offer price without an ability to elect the resource-specific exception.[39] If PJM disagrees with a capacity resource's certification that it is unsubsidized, the resource shall be subject to the MOPR unless and until ordered to do otherwise by the Commission.

While PJM's proposal to have the capacity resource determine what is and is not a state subsidy and whether it applies to a particular facility makes its own task easier, PJM's proposal lacks clarity, transparency, and accountability for everyone else. As an initial matter, although PJM is correct that capacity resources are in the best position to know what revenues or indirect benefits they are receiving from a state or local entity, it is highly questionable to leave solely to such resource owners the complex legal question of whether those revenues or benefits amount to a state subsidy. Given the reach not only of the Commission's definition of state subsidy but

[35] Compliance Filing at 28.
[36] *Id.*
[37] *Id.* at 24.
[38] Demand Resource and Energy Efficiency resources have until 30 days before an RPM auction. *Id.*
[39] *Id.* at 26.

its potential exceptions, differences of interpretation are certain to arise across the PJM footprint. While we appreciate that PJM does not wish to be in the role of identifying actionable subsidies and agree it is both infeasible and inappropriate for PJM to serve as the final arbiter on state legislative intent, PJM cannot avoid having to make determinations on what state subsidies require mitigation. Absent some predictable, public method for resolving uncertain cases, generation owners and policymakers alike face unacceptable risks.

It is also clear from several stakeholder meetings that many market participants have logical questions about what constitutes a state subsidy. For example, stakeholders have raised questions regarding:

- what constitutes general industrial development and local siting support.[40] In neither the Commission's orders nor PJM's compliance filing is the term "general industrial development" defined, nor is it clear how this term differs from "local siting support" and whether a battle between localities can be targeted at a specific generating resource;
- whether coal companies in West Virginia benefiting from an industry-specific state tax cut are subject to the MOPR;
- if power purchases by a government entity for its own use trigger the MOPR;
- whether generators benefiting from upstream fossil fuel subsidies are subject to the MOPR;
- under what circumstances indirect participation by a capacity resource in default service supply auctions are subject to the MOPR;
- whether nuclear resources in the state of Ohio benefiting from revenues under House Bill 6 are eligible for the existing Renewable Portfolio Standard resource exemption;
- whether power sold to brokers and subsequently sold to public power or governmental entities is subject to the MOPR;

[40] The Order on Rehearing notes that local siting subsidies exempt from MOPR can include "payments (including payments in lieu of taxes)…designed to incent or promote, general industrial development in an area." Order on Rehearing at P 107. The Commission then notes that with regard to whether local property tax relief is a state subsidy, "any out-of-market payment that fits within that definition will be considered a state subsidy, including tax relief or other concessions *that are not generally applicable*." *Id.* at P 109 (emphasis added). PJM's compliance filing defines the general industrial exception as using criteria "designed to incent or promote, general industrial development in an area or designed to incent siting facilities in that county or locality rather than another county or locality." Compliance Filing at 13.

- whether power plant-specific rates for water, sewage, station power, or property taxes constitute a state subsidy.

Generators who will be submitting sworn certification statements will look to PJM to make those determinations. PJM will still be required to make judgment calls and should anticipate a clear path for dispute resolution. This process should anticipate adversarial positions. For example, resource owners may take a more encompassing view of their rival's subsidies and/or PIOs may have a different position on what constitutes a subsidy than fossil-fuel plant owners, and so on.

As PJM's effort to implement the Commission's decision that default service supply auctions may constitute State Subsidies has demonstrated, PJM also needs clear standards from the Commission that do not simply refer to the Commission's all-encompassing definition of state subsidy.[41] Clear, workable standards are necessary to implement the Commission's order, and failure to do so will make it more likely that the Commission and courts will have a never-ending stream of MOPR litigation.

Additionally, PJM's self-certification process raises transparency and accountability concerns. PJM states that it will work with the Market Monitor to develop a non-exhaustive list of programs determined to qualify as state subsidies, based on information provided by Capacity Market Sellers, and that it will post this list in a guidance document.[42] However, there is no requirement that sellers provide supporting information along with their certification unless PJM or the Market Monitor request it, and there is no role in this process for independent submissions,

[41] Details of PJM's proposed implementation of this decision by the Commission are still being discussed in the stakeholder process and will not be presented to the Commission until PJM's second compliance filing on June 1, 2020. Nevertheless, Public Interest Organizations flag this issue now as one key example of the problems associated with PJM's approach to allowing and requiring generators to self-identify as subject to the MOPR.
[42] Compliance Filing at 27.

input, verification, or challenges from the public or other interested parties.[43] Further, PJM explicitly defines its non-exhaustive list as being "non-binding guidance" and reiterates that the burden of accurate reporting is on the seller, "irrespective of any guidance provided by PJM and the Market Monitor." Such a lack of clear process for establishing binding guidance, resolving disputes, or taking accountability could undermine confidence in the process.

This kind of uncertainty, case-by-case analysis, and lack of transparency or oversight is likely to result in inconsistent application of the MOPR in a manner that introduces discriminatory treatment of resources. A transparent process should:

- Give all participants a public reference to what policies have been identified as or, critically, as not triggering the MOPR.
- Allow any party to submit a policy for consideration or comment on a determination and set clear timelines for the decision-making process.
- Provide a clear path for determinations to be clarified or challenged at FERC, including challenges by third parties, that incents and protects parties proactively seeking clarification.

PJM's self-identification proposal can be expanded to meet these transparency goals. In addition to its proposal to post policies considered to be State Subsidies as those determinations are made, asset owners and other parties could submit comments on such determinations to PJM, or submit its own requests for opinions, which would also be posted publicly. Cases where parties disagree with PJM, or PJM cannot determine the answer would be clearly identified, creating a ready path for requests for clarification by FERC is critical to quick dispute resolution. Given the large financial stake of a misidentification, such as the imposition of the asset life ban on any resource that incorrectly fails to identify itself as subject to the MOPR, PJM should adopt a process that identifies uncertainties and provides a path to definitive answers.

[43] *Id.* at 28.

(iii) Without proper oversight, PJM's proposed unit-specific process could lead to undue discrimination

Transparency is critical to a functioning and fair market, and the Commission's December 2019 order recognized that the unit-specific offer process must provide explicit information about the standards that it will apply when reviewing unit specific offers as a safeguard against arbitrary ad hoc determinations that market participants and the Commission may be unable to reliably predict or reconstruct.[44] This is especially so given the dramatic expansion the unit-specific offer floor process created by the Commission's MOPR orders, and the importance placed upon that process by the Commission and many parties to avoid some of the over-mitigation that will result from the MOPR. The Commission's MOPR orders threaten to impose mitigation on most new resources offering into the capacity market, meaning that the unit-specific offer floor process will take on enormous importance in determining entry to the market and clearing prices. Because so many prices will be set administratively, rather than by market forces, it is incumbent on the Commission to ensure that this process is executed fairly.

Resources that are subject to the MOPR and wish to apply for a unit-specific exception "must submit to PJM and the Market Monitor 'documentation to support the fixed development, construction, operation, and maintenance costs of the Capacity Resource, as well as estimates of offsetting net revenues.'"[45] PJM's proposed process for review of unit-specific offers explicitly limits openness and transparency to the seller, PJM, and the IMM.[46] While this may be appropriate to the extent the information submitted is confidential or competitively sensitive, the obscured nature of this process creates a potential for resource types to be treated differently in their requests for unit-specific offers in ways that are not justified. To provide assurance against

[44] December 2019 Order at P 216.
[45] Compliance Filing at 74.
[46] *Id*. at 79.

undue discrimination being exercised, the Commission should require PJM to regularly submit a report summarizing each of the unit-specific offers approved, or rejected for each auction. Such a report would permit the Commission to detect uneven implementation of the standards used to determine these offers, and even to propose updates to the methodologies for the default offer floors where a large percentage of resources of a particular type are able to demonstrate departures from some of the basic assumptions underlying the default offer floor. This would allow the default offer floor prices to be as accurate as possible, thereby reducing the burden on smaller resource owners from needing to seek unit-specific offers, and avoiding some of the administrative burden on PJM and the IMM associated with the likely flood of requests for unit-specific offer floors. While the unredacted version of this PJM report could not be made public, we propose that a version reporting aggregated data and statistics for each resource type be provided to stakeholders as soon as possible following each BRA. This report could indicate how many resources of each type sought unit-specific offers, how many were granted them, by what percentage the default floor was reduced on average, and other similar information that can be safely reported in the aggregate without disclosing competitively sensitive information. Such data, along with more accurate default price floors, will help the public and especially state policymakers understand how the MOPR is being implemented, and how it is affecting different resource types.

II. CONCLUSION

WHEREFORE, for the foregoing reasons, PIO respectfully urges the Commission to accept the provisions in PJM's Compliance Filing, with the additional directives to PJM as discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served in accordance with 18 C.F.R. § 385.2010 upon each party designated on the official service list in this proceeding, by email.

Dated at this 15th day of May, 2020.

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